STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-94:

MISSOULA ELEMENTARY ASSISTANTS AND PARAPROFESSIONALS, MEA/NEA, Complainant,	)	FINAL ORDER
vs.	)	
MISSOULA ELEMENTARY DISTRICT #1, Defendant.	)	

* *

On May 20, 1994, Joseph V. Maronick, Hearing Examiner for the Department of Labor and Industry, issued his findings of fact, conclusions of law and proposed order. Defendant filed exceptions to the hearing examiner's findings of fact, conclusions of law and proposed order on June 3, 1994. The matter was heard before the Board of Personnel Appeals (Board) on January 25, 1995.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. The Board adopts as its own the hearing examiner's findings of fact numbered 1 through 10. The Board finds that those findings are supported by substantial credible evidence.

2. The Board adopts as its own the hearing examiner's conclusions of law numbered 1 through 4 and 7. The Board determines those conclusions of law to be legally correct. The hearing examiner's conclusion of law number 7 is renumbered as conclusion of

law number 5.

3. The Board rejects and vacates the hearing examiner's conclusions of law numbered 5, 6, and 9. The Board finds those conclusions of law to be legally incorrect. The Board rejects the hearing examiner's conclusion of law number 8 as being partially incorrect. The Board acknowledges the hearing examiner's cite to NLRB v. Katz, 369 U.S. 736 (1962) as being a correct statement of the law but inapplicable to the present case.

4. The Board adopts the following additional conclusion of law to be incorporated into the hearing examiner's decision as modified by the Board:

> 6A. The Defendant did not commit an unfair labor practice by having unit members report to work one-half day prior to the start of classes.
>
> The contract term found in Article 9 Section 9.2 (3) provides the Defendant with authority to determine the normal work year on a job-by-job basis. Defendant in the present case properly exercised its discretion pursuant to the contract by determining when unit members were to report to work according to program needs and availability of funds. The mere fact that in prior years most of the unit reported to work two days prior to the start of classes does not defeat the express contract provision which enabled the defendant to determine the normal work year. Further, given the fact that in prior years, most, but not all, of the unit reported two days prior to the start of classes, it cannot be said that the change in the reporting date was done on a unit basis. Previously, Chapter I aids, who are part of the unit, did not report to work two days prior to start of classes. The Defendant's actions were proper and in accordance with a specific provision of the contract and were not an unfair labor practice.

5. The Board rejects the hearing examiner's recommended order. The Board orders as follows:

IT IS HEREBY ORDERED that the Defendant did not commit an unfair labor practice by having unit members report to work one-half day prior to the start of classes.

Complainant's unfair labor practice charge is hereby dismissed.

DATED this 22nd day of February, 1995.

BOARD OF PERSONNEL APPEALS

By _____
WILLIS M. MCKEON, CHAIRMAN

Board members Talcott, Henry, Schneider, and Hagan concur.

* *

NOTICE: You are entitled to appeal from this order by filing a petition for judicial review with the District Court no later than thirty (30) days from the service of this order. The procedure and requirements for filing a petition for judicial are governed by the provisions of Section 2-4-701, et seq., MCA.

* *

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 23rd day of February, 1995:

Don K. Klepper
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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 3-94:

MISSOULA ELEMENTARY ASSISTANTS AND PARAPROFESSIONALS, MEA/NEA, Complainant, vs. MISSOULA ELEMENTARY DISTRICT 1 Defendant.	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND PROPOSED ORDER

* * * * * * * * * *

I. INTRODUCTION

On September 3, 1993, the Missoula Elementary Assistants and Paraprofessionals, MEA/NEA (Complainant) filed an unfair labor practice charge with the board alleging the Missoula Elementary District No. 1 (Defendants) violated Section 39-31-401 (1), (5), MCA by reducing the number of days to be worked without bargaining the issue. The Defendant on September 30, 1993 denied the charge. An October 21, 1993, Investigation Report and Determination found sufficient disputed facts and legal issues to refer the matter to hearing.

A telephone hearing was held on January 5, 1994, before Joseph V. Maronick, duly appointed hearing officer of the Labor Commissioner. Parties present duly sworn and offering testimony included Sandy Bushek, Sherry Postma, Lora Mehrer, Lauren Risinger, and Myrna Kitchen. Complainants were represented by Counsel, Karl England, and Defendants represented by Dr. Don K. Klepper.

Exhibits admitted to the record by administrative notice were the Charge, the Collective Bargaining Agreement, the Complaint

Response and the Investigation Report and Determination. Also admitted to the record were Complainant Exhibits 1-7 and Defendant Exhibits 1-7. Admitted over objection were Defendant Exhibits 8 and 9. Defendant Exhibit 8 and 9 were letters written after the charge was filed and admitted "for what they're worth" understanding their having been written after the charge was filed. Final post-hearing briefs were received February 28, 1994.

II. FINDINGS OF FACT

1. The Complainant association is the exclusive bargaining representative for certain classified and certified Defendant employees. The parties association is governed by a collective bargaining agreement.

2. For at least five years (testimony of Sandy Bushek hearing tape 1) prior to the start of school year 1993-94, all unit employees except Chapter I aides, which make up about 5 percent of the total unit, (Defendant post-hearing brief page 7) reported to work two days prior to the start of classes. For the 1993-94 school term unit members were notified not to report until one half day prior to the start of classes. This action was taken by the Defendant to redistribute funds.

3. The parties agree that Chapter I aides work with a special class of students who are not "learning disabled like those students in special education programs. Chapter I students are normally academically deficient because of other factors . ...they can exit the program free from the restrictions of the Individual Education Program (IEP) used by handicapped children and their advocates." (Defendant Reply Brief pg. 5-6)

4. The IEP must be developed for handicap children and includes;

(1) the child's current level of educational performance;
(2) annual goals and short term objectives;
(3) special education and related services to be provided;
(4) the extent of participation in regular education programs;
(5) projected dates for initiation and expected duration of special services; and
(6) objective criteria and evaluation procedures to determine whether instructional objectives are being met.

5. Chapter I assistants do not start two days before the school year as other unit members because of funding and individual student needs determinations.

6. The collective bargaining agreement provides in Article 9 Section 9.2 as follows;

9.2 WORKDAY

(1) The time the workday commences may vary according to the needs of the district. All employees shall have at least thirty (30) minute duty free lunch exclusive of work day.
(2) Employees shall have a fifteen (15) minute break in the morning and a fifteen (15) minute break in the afternoon.
(3) The normal work year shall be determined on program needs and availability of funds and will be determined on a job-by-job basis. (emphasis added) The bargaining unit members will not be required to do work outside the normal work day.

7. Relying on Section 9.2 (3), the Complainant contends the Defendant violated the act because nearly the entire unit was subjected to a day and one half reduction in work days on a program basis rather than on a job-by-job basis. The Complainant has discussed and proposed changes in Article 9.2 Subsection 3 language when bargaining but the language has not been changed.

8. The Defendant contended student services are regulated by the IEP and work hours of necessity must be changeable. In their Reply Brief pg. 4-5 the Defendant indicated, in part;

> When the **Individual Educational Program** is developed for a student, one of the components is to assign on an individual needs basis, the hours of support services to be rendered by an instructional assistant/paraprofessional. The hours of support service contained in an **Individual Educational Program** are dependant upon the specific needs of the student and can fluctuate greatly. The hours may increase or decrease. In fact the hours of support service may not been (sic) needed during periods of time when the student is undergoing medical treatment or is absent from school.
>
> When the District bargained this Agreement with the Association both sides were cognizant of the fact that the hours worked by the support staff in delivering the mandated services dictated by the Individual Education Program could vary from week to week, month to month, and year to year. An annual review of each Individual Education Program, as well as three year evaluation, must occur. This process constructively guarantees changes in assignments, work day, work week and work year.

9. The Defendant offered the following arguments in Post Hearing Brief as the basis to deny the charge. (in summary)

(1) The Defendant must, because of changes in laws, administratively be able to adjust the work hours and days on a job-by-job basis.

(2a) The contract terms which have not changed in Article 9.2 (3) regarding adjustment of individual work year based on needs and funds determined on a job-by-job basis and Article 13, Management Rights, allow management to direct, hire, relieve, maintain efficiency and take other necessary actions.

(2b) The Complainants waived their right to bargain the length of the school year based upon the fact they have unsuccessfully tried to change the language in Article 9 to guarantee a work year, work day to unit members and now, it would appear, have or had given up that effort.

(3) Receipt of federal funds is premised upon following terms identified in enabling legislation including IEP's which determine the use of hourly employees.

(4) Unit members are "at will" employees without a certain employment term duration.

(5) Employees have no property rights in their job.

10. The Defendant indicated they were merely redistributing the financial resources to better use funds and intended to offer staff additional training or work time on a volunteer basis to recoup the one and one half days not worked at the beginning of the school year.

III. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this complaint under Sections 39-31-401, et seq. MCA, and under implementation rules of ARM 24.26.601 and 24.26.680-685.

2. The Montana Supreme Court has approved the practice of the Board of Personnel Appeals using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act as the state act is so similar to the Federal Labor Management Relations Act, State ex.rel.Board of Personnel Appeals v. District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); Teamsters Local No. 45 v. State ex. rel. Board of Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); City of Great Falls v. Young (Young III), 221 Mont. 13, 683 P.2d 185, 119 LRRM 2682 (1984.

3. A unilateral change, that is a change initiated by the employer without bargaining with the union, in a mandatory subject of bargaining is a refusal to bargain in good faith and is a per se unfair labor practice, NLRB v. KATZ, 369 U.S. 736 (1962).

4. The Public Employees Collective Bargaining Act, follows **KATZ**, supra.

> The U.S. Supreme Court held in 1962 that an employer's unilateral change in a working condition ...may be held to violate Section 8a (5) [similar to section 39-31-401(5) MCA] even in the absence of a finding that the employer was guilty of overall bad faith bargaining because the conduct amounts to a refusal to negotiate about a matter and must of necessity obstruct bargaining, **AAUP v. Eastern Montana College** ULP 2-82 (1982).

The board similarly relied on **KATZ** in finding that unilateral imposition of an in-district residency requirement was an unfair labor practice, **MEA v. Musselshell County School District (Roundup)**, ULP 6-77 (1977).

> Once practices are established, an employer is "required to bargain in good faith; unilateral changes ... even if (the practices) are not contained in the contract; cannot be changed unless... there exists a waiver by the party to whom the duty to bargain is owed. In the instant case ...[no waiver] was obtained by the Defendant prior to making the change in evaluation procedure." **Bozeman Education Association v. Gallatin County School District No. 7 (Bozeman)**, ULP 43-79 (1981).

5. The change in work days was made on a unit basis and involved a mandatory subject of bargaining; wages, hours, and working conditions.

6. The contract term found in Article 9 Section 9.2 (3) provides for authority of the Defendant to determine the normal work year on a job-by-job basis. This did not occur. The language and bargaining history relating to Article 9 Section 9.2 is insufficient to find a waiver of the association's right to bargain over the changes work hour changes which occurred. The argument offered by the Defendant would be appropriate if:

(1) The change were made on a "job-by-job" basis if the law changed a job requirement.

(2a) A change for some legitimate reason had been made on a "job-by-job" basis.

(b) The Complainant had somehow agreed beforehand and waived the "job-by-job" basis term.

7. The parties agree that the "job-by-job" requirement exists in the contract section relied upon by both parties in their argument related to this action.

8. As pointed out in Complainant brief, the federal funding, employment at will and property interest arguments are irrelevant. Unilateral changes in wages, hours, or working conditions during the course of a collective bargaining relationship are per se violations of the act. NLRB V. KATZ, 369 U.S. 736 (1962).

9. The position offered by the Defendant that they intended to allow affected staff the opportunity to work the one and one half days on a volunteer basis in training or some other activity does not change the conclusion reached here. The offer of additional training or makeup days may also involve a unilateral change in working conditions.

IV. RECOMMENDED ORDER

The Defendant is hereby found to have violated Section 39-31-401(3) and (5), MCA. The Defendant is hereby ordered to cease and desist from further reduction in days of work under Article 9 Section 9.2 (3) other than on a job-by-job basis hereafter. They are also hereby ordered to pay the affected unit members for the day and one half they would have worked prior to the start of classes.

In accordance with Board Rule ARM 24.26.684 the above recommended order shall become the final order of this board unless written exceptions are filed within twenty (20) days after service of these findings of fact and conclusions of law and recommended order upon the parties.

Entered and date this 20th day of May, 1994.

Joseph V. Maronick

Joseph V. Maronick
Hearing Examiner

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

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P.O. Box 8142
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Dr. Don Klepper
Director of Personnel
Missoula Elementary School District
215 South Sixth West
Missoula, MT 59801

DATED this 20th day of May, 1994.

Christine A. Roland